

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>ALTON RAY BURTON</b>	)	
Claimant	)	
	)	
VS.	)	
	)	
<b>ACCENT LIGHTING, INC.</b>	)	
Respondent	)	Docket No. 1,017,325
	)	
AND	)	
	)	
<b>KANSAS BUILDING INDUSTRY WORKERS COMPENSATION FUND</b>	)	
Insurance Carrier	)	

**ORDER**

Respondent and its insurance carrier requested review of the January 30, 2006, Award by Administrative Law Judge John D. Clark. The Board heard oral argument on May 24, 2006.

**APPEARANCES**

Robert R. Lee, of Wichita, Kansas, appeared for claimant. Roy T. Artman, of Topeka, Kansas, appeared for respondent and its insurance carrier.

**RECORD AND STIPULATIONS**

The Board has considered the record and adopted the stipulations listed in the Award.

**ISSUES**

The Administrative Law Judge (ALJ) found that claimant had a 20 percent impairment of function to the body as a whole. The ALJ also found that claimant made a bona fide effort to find employment and is entitled to a work disability. Based on the testimony of Dr. Paul Stein, the ALJ found claimant had a task loss of 27 percent. The ALJ

also found that claimant had a wage loss of 100 percent. Averaging claimant's task loss and wage loss, the ALJ found that he had a work disability of 63.5 percent.

Respondent and its insurance carrier (respondent) does not contest that claimant suffered a work disability. And respondent does not dispute the ALJ's finding that claimant's task loss is 27 percent. Respondent, however, argues that claimant did not make a good faith effort to find employment because he limited his job search to the electronics and avionics fields. Respondent argues that the ALJ should have imputed a wage of \$360 per week to claimant pursuant to the testimony of Jerry Harding, making claimant's wage loss 43 percent and his work disability 35 percent.

Claimant requests that the ALJ's Award be affirmed in its entirety. Therefore, the only issue for the Board's review concerns the wage loss prong of the two-part work disability formula.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant was 32 years old at the time of the Regular Hearing. He had completed high school, two years of college, and 14 months of technical school. He has done warehouse work, assembly work, restaurant work, and sales.

Claimant began working as a warehouse clerk for respondent in August 2000. As a warehouse clerk, he pulled orders, loaded and unloaded trucks using a forklift, and repaired and hung fixtures. He was also a shipping and receiving clerk. As a result of repetitive lifting of lighting fixtures and stocking shelves, claimant injured his back.

Dr. Paul Stein, a board certified neurosurgeon, initially saw claimant on August 4, 2004, by agreement between his attorney and the attorney for respondent. Claimant gave him a history that he started having problems with his back in 2003. He went to the doctor in June of 2003 because of low back pain which radiated into his right buttock. He also had pain and numbness in the left lower extremity. Dr. Stein recommended some temporary work restrictions and ordered a myelogram and CT scan. The myelogram revealed claimant had spondylolysis and a seven millimeter spondylolisthesis. Dr. Stein opined that claimant's work activities aggravated his spondylolisthesis. He referred claimant to Dr. Theo Mellion, who performed a lumbar fusion at L4-5 and L5-S1. Following the surgery, claimant was sent to physical therapy. After surgery and physical therapy, claimant was complaining that the pain in his leg was worse than his back pain. An MRI was performed, which showed no evidence of impingement. Physical therapy was continued and a functional capacities evaluation (FCE) was performed. However, claimant's leg pain was still severe and was getting worse. Dr. Stein released claimant

from treatment on May 26, 2005, but with the recommendation that a physician be authorized to provide and monitor analgesic medication.

Claimant continues to treat with Dr. Sandra Barrett. He states that his condition has worsened and he is having constant left leg and back pain. He stated that the pain is no better now than before the surgery performed by Dr. Mellion. He described it as a radiating pain that shoots up and down his leg all the way to his toes, the front and back of his legs, and in his buttocks area.

Dr. Stein rated claimant as having a 20 percent permanent partial impairment to the body as a whole under the diagnosis related estimate lumbosacral Category IV of the *AMA Guides*.<sup>1</sup> He placed permanent restrictions on claimant as set out in the FCE. Those restrictions included limiting lifting from floor to knuckle to 25 pounds occasionally and 17.5 pounds frequently, from knuckle to shoulder to 30 pounds occasionally and 20 pounds frequently, and from shoulder to overhead to 30 pounds occasionally and 15 pounds frequently. Carrying should be limited to 20 pounds occasionally and 15 pounds frequently. Pushing, pulling, sitting, standing, walking, climbing stairs, stooping, kneeling, crouching, crawling, and reaching could be done frequently but not constantly.

Dr. Stein reviewed a task performance capacity assessment prepared by Jerry Hardin that listed the work tasks claimant had performed during the relevant 15-year period before claimant's accident. Dr. Stein went through each task with the restrictions placed on claimant in the FCE and agreed with Mr. Hardin's assessment of which tasks claimant was able or unable to perform. Of the 74 nonduplicated tasks, Dr. Stein opined that claimant is unable to perform 20 of them for a 27 percent task loss.

Respondent was unable to accommodate claimant's restrictions. Therefore, claimant began looking for other work after being released by Dr. Stein and terminated by respondent. He states that he generally looks for four or five jobs a week. Although claimant lives in Wichita, he has not limited his job search to that area. He has looked for jobs in the Kansas City area and elsewhere, including Texas. With his vocational-technical training, he is looking for electronics technician positions where he could sit more and there would be less heavy lifting. He believes the reason he has been unable to find a job is his restrictions. He says that no business asked him in detail what his restrictions were but that they do not want anyone who has any restrictions. At the November 1, 2005, Regular Hearing, claimant submitted a list of 77 business he contacted concerning employment during the period from July 5, 2005, to November 1, 2005.

Claimant testified that he has a FCC license, which would allow him to work in communications and aviation and build navigational parts and telecommunication parts.

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<sup>1</sup>American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

He also received a certificate in electronics and aviation from his vocational-technical training, which would allow him to design electrical components, work with circuit boards, and trouble-shoot with different companies and industries. Those were the types of jobs he has primarily applied to in his job search.

Claimant previously worked as a certified medical aide. His certification as a medical aide was issued through Missouri and is no longer valid. He also acknowledged that he has had several jobs in the past in the restaurant industry. However, he claimed those were in between jobs when he needed work while he was in school. He had also previously worked in retail sales. He has not thought about returning to those types of work. He is trying to get a job in the field in electronics and/or avionics because he went to school for that certification.

Claimant testified he is working with Wichita Technical Institute to try to find a job. He also has worked with the Arnold Group, a job placement company. He has searched for jobs online and has posted his résumé on websites accessible to prospective employers. He said some of the positions he has applied for require two to five years' experience. He has hands-on experience but not on-the-job experience.

Jerry Hardin, a human resource consultant, met with claimant on June 22, 2005, at the request of his attorney, to put together a task list and render an opinion on wage loss, including claimant's post-accident wage earning ability. He prepared a task list with 74 unduplicated tasks.

Mr. Hardin stated that claimant's best avenue to earn a wage would be to pursue employment using the certification he has with his FCC license in electronics and avionics. When asked about what claimant could earn if he were to find a job in the open labor market, Mr. Hardin testified:

Well, in Wichita, since we are a large city affiliated in the aviation industry, on normal circumstances I would think that some of the aircraft companies would be interested in him. Right now they are in kind of a layoff mode with the readjusting of companies that have sold and some of the businesses, Raytheon, Cessna, those companies are outsourcing down to Mexico and we are kind of in a slow layoff mode from aircraft.

So, when I saw him, when I did the evaluation on him, even with that education, I thought more likely than not his wage would be \$360 a week.<sup>2</sup>

Mr. Hardin admitted that claimant would be more apt to find employment if he sought employment in fields other than electronics and avionics. However, he stated claimant would earn a higher wage in electronics or avionics. Jobs in fast foods and as a

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<sup>2</sup>Hardin Depo. at 9-10.

cook would be more available but would not pay as well. When asked how much claimant might be able to earn in some of those other employments, such as a shift manager in a restaurant, Mr. Hardin testified that he might be able to earn \$360 per week as a starting salary. Using the stipulated average weekly wage of \$646.98, this would be a wage loss of approximately 43 percent. However, Mr. Hardin added that if claimant found employment in the electronics aviation field with one of the aircraft companies, he could earn more.

Although claimant has limited his job search somewhat, the Board finds he has made a good faith effort to find appropriate employment. When claimant was released by Dr. Stein with permanent restrictions, respondent was unable or unwilling to offer claimant a job within those restrictions. Furthermore, respondent did not offer claimant any vocational rehabilitation or job placement assistance. By the time of the Regular Hearing, claimant had been released from treatment for approximately five months. During that time, claimant had applied for four to five jobs a week. He has not refused any job offer.

It is not known whether respondent communicated to claimant its concerns about the scope of his job search before the Regular Hearing. It is also not known whether claimant expanded the scope of his job search after the Regular Hearing. Although expanding his search to other, less lucrative, areas would be appropriate, it had not yet reached a point where his failure to do so is evidence of a lack of good faith. Given the expanded geographic area of his job search, claimant had not exhausted the pool of prospective employers in the fields of work he was focusing on. It would be reasonable to expect claimant to expand his job search to include other types of jobs in the near term should claimant remain unsuccessful in his job search. In reviewing the employers listed on claimant's Exhibit 2, however, it appears that claimant has sought a greater variety of jobs than his testimony would suggest. It would be better if claimant had provided more information on that list such as the type of job he was applying for, the pay being offered, and whether there was any follow-up or contact beyond merely submitting an application or résumé. Nevertheless, no vocational expert has opined that claimant's job search efforts are not reasonable.

Based on this record, the Board finds claimant has met his burden of proving a good faith job search. Accordingly, the wage loss prong of the work disability formula should be based upon claimant's actual post-accident earnings. The ALJ's finding of a 100 percent wage loss is affirmed.

### **AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge John D. Clark dated January 30, 2006, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of June, 2006.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

- c: Robert R. Lee, Attorney for Claimant  
Roy T. Altman, Attorney for Respondent and its Insurance Carrier  
John D. Clark, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director